IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

PETER J. CARPENTER, Petitioner, vs. WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of WABASH RAILWAY COMPANY, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY, Respondents.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITION

Of Respondents, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, for a Modification of the Judgment Entered Herein, or, as an Alternative, for a Rehearing.

FRANK C. NICODEMUS, JR.,
HOMER HALL,
NAT S. BROWN,
Counsel for Respondents, Receivers of Wabash Railway Company.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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The petition should be granted:

I. Because the judgment of this Court, if permitted to become effective, will seriously impair vested rights of many other judgment creditors of the insolvent Wabash Ry. Co., without the facts relating to their situation in the Wabash Receivership proceeding being before the Court and without any opportunity on their part to be heard upon the issues 2

II. The judgment of this Court directing the District Court to allow petitioner's claim cannot end this litigation for the reason that it does not dispose of the question whether petitioner is entitled to be paid interest, and if so from what date..... 8

III. Because the application of Amended Section 77 (n) of the Bankruptcy Act retrospectively to equity receiverships of railroad corporations now pending in the courts of the United States is violative of the rights of other lien creditors of the insolvent Railway Co. under the Tenth Amendment to the Constitution..... 9

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

PETER J. CARPENTER, Petitioner, vs. WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of WABASH RAILWAY COMPANY, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY, Respondents.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITION

Of Respondents, Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, for a Modification of the Judgment Entered Herein, or, as an Alternative, for a Rehearing.

Now come respondents Norman B. Pitcairn and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and respectfully petition this Honorable Court to modify the judgment entered herein, in the respects hereinafter set forth, or, as an alternative, to grant a rehearing of this cause, for the following reasons, to wit:

I.

Because the judgment entered herein on January 29, 1940, if permitted to become effective, will seriously impair vested property rights of many other judgment creditors in and to the assets of the insolvent, Wabash Railway Company, without the facts relating to their situation in the receivership proceedings being before this Court, and without any opportunity to be heard upon the issues of the fact and law, contrary to the Due Process clause of the Fifth Amendment to the Constitution.

As fully disclosed by the Court's opinion, this case is before the Court on the petition for review, by certiorari, of the judgment of the Circuit Court of Appeals for the Eighth Circuit, which affirmed the judgment of the District Court for the Eastern District of Missouri denying petitioner's application for leave to file his intervening petition in the Wabash receivership proceedings. The application to intervene was filed in the District Court on January 26, 1938; the petition of intervention referred to was for an order of court discharging the receivers and dismissing the receivership suit; declaring plaintiff's personal injury judgment claim to be preferential and directing the payment thereof from the assets of the receivership estate, and for other relief. Manifestly, the primary object of the intervention was to secure the payment of petitioner's judgment claim against the Wabash Railway Company. The District Court denied petitioner's application for leave to intervene on August 31, 1938, and on petitioner's appeal to the Court of Appeals for the Eighth Circuit the judgment of the District Court was affirmed by an opinion dated May 13, 1939. Thereafter, on July 26, 1939, petitioner filed his petition to this Court for a review of the judgment of the Court of Appeals, and on October 9, 1939, this Court granted certiorari "limited to the question of the right of the petitioner to intervene in order to assert priority."

While petitioner's petition for certiorari was pending in this court Congress passed an Act, approved August 11, 1939, amending Subsection (n) of Section 77 of the Bankruptcy Act, the effect of which was to extend the provisions of that subsection to equity receivership of railroad corporations now or hereafter pending in any court of the United States. Following the approval of that mandatory Act petitioner filed a supplemental petition for review in which he called the Court's attention to the provisions of that Act, and asserted, in effect, that even though prior to that amendment his right to intervene was discretionary with the lower court, his right of intervention had become absolute by virtue of the provisions of said Act; and, as stated, this Court granted the petition, limited as hereinbefore mentioned as to the scope of the review. On that state of the record there was no question before the Court except the single question of law, whether, under the provisions of said Act of August 11, 1939, petitioner had the right to intervene in the District Court proceeding "in order to assert priority." No facts bearing upon the existence or rights of other judgment creditors of the Wabash Company, as shown by the records of the receivership proceedings in the District Court, were, or could be, brought before this Court for consideration or determination if due regard was to be observed in respect to the limitation contained in the order granting the right of review.

These respondents, as receivers of the Wabash Railway Company, conceive it to be their right and duty to speak and act for the best interests of all creditors of the insolvent Railway Company, who, in due course, have filed their claims in the receivership proceedings and had them allowed as judgments against the assets of the receivership estate long prior to the enactment of the said Act of August 11, 1939 (In re Mullen, 101 Fed. 413; In re Economical Printing Company, 110 Fed. 514).

We therefore urge upon the Court the claims of the other judgment creditors of their constitutional right to be heard upon the question whether the application of the provisions of the Act of August 11, 1939, to equity receiverships of railroad corporations now pending in the courts of the United States will not substantially impair their vested property rights as judgment lien creditors of the insolvent Railway Company in violation of the due process clause of the Fifth Amendment to the Constitution; and to that end to further urge that this Court modify its judgment entered herein on January 29, 1940, by vacating the judgment of the Court of Appeals entered in this cause (103 Fed. [2nd] 996) and remanding the cause to the District Court with direction to allow petitioner to intervene in the Wabash receivership proceedings for the purpose of asserting priority.

In reaching a conclusion upon the foregoing request of these respondents we urge the Court to give due consideration to the following facts which appear of record in the said receivership proceedings in the District Court, namely:

(a) Approximately 125 creditors of the Wabash Company filed their claims in the receivership proceeding, each of which had been duly heard and allowed as judgments in favor of said claimants, respectively, and against Wabash Railway Company, many months prior to the enactment approved August 11, 1939. Under the well-settled law of the State of Missouri the filing and allowance of a creditor's claim in an insolvency proceeding determines his status to be that of a judgment creditor (Coleman v. Hagey, 252 Mo. 102, 128, 158 S. W. 829; Cf. Erie Railroad v. Tompkins, 304 U. S. 64) and by virtue of Sections 1103, 1104 and 2841, Revised Statutes of Missouri 1929, and Section 812 of Title 28 U. S. C. A., United States Statutes, each of said judgment creditors became vested with a judgment lien upon all of the railroads and property of the Railway Com-

pany located within the territorial jurisdiction of the District Court of the United States for the Eastern District of Missouri. And it seems to be well settled that judgment liens, mortgage liens, and other statutory liens are vested property rights entitled to the protection of the due process clause of the Fifth Amendment to the Constitution (Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555; Ginsberg v. Lindel [C. C. A. 8], 107 Fed. [2nd] 721).

The aggregate amount of the other judgment creditor claims hereinabove mentioned is approximately $246,000. In addition to this class of claims there are now pending before the District Court twenty claims wherein the respective claimants have heretofore recovered judgments against the Railway Company for damages for personal injuries or death suffered while in the employ of the Railway Company, and each of these claimants is asserting priority under the said Act of August 11, 1939. Certain of the claimants last mentioned have petitioned the Court for orders directing the payment of the claims, and the other judgment creditors hereinbefore mentioned have filed answer to those petitions, through these respondents, asserting their claims as judgment lien creditors, and that priority of payment, from the assets of the insolvent railway corporation, of the employe personal injury judgment claims will directly and substantially impair their constitutional rights in the respects herein indicated by decreasing or diluting pro tanto the assets of the receivership estate which otherwise would be distributable pro rata among all general creditors in accordance with well-recognized principles of equity.

It, therefore, will be observed that if the judgment of this Court entered herein on January 29, 1940, to the effect that the judgment of the Circuit Court of Appeals be vacated and the cause remanded to the District Court with directions to allow petitioner's claims in accordance with the amendatory Act of August 11, 1939, without further

hearing will necessarily deprive other judgment creditors whose claims do not fall within that statutory provision of all opportunity to be heard upon their claim that such interpretation of the Act of August 11, 1939, will impair their vested rights in the assets of the receivership estate which became vested long prior to the effective date of that Act.

It may readily be conceded "that the reasonable classification of claims as entitled to priority because of superior equities" may be the subject of determination by Congress in providing for the distribution of assets in bankruptcy proceedings, but it is equally true that when Congress undertakes to provide by statutory provision for the distribution of the assets of bankrupt estates it must act within the limits prescribed by the Constitution (Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555; Re Tennessee Publishing Company, 81 Fed. [2d] 463, 299 U. S. 18; Ginsberg v. Lindel [C. C. A. 8], 107 Fed. [2d] 721).

This limitation upon the power of Congress was very clearly recognized in the case of Kuehner v. Irving Trust Company, 299 U. S. 445, cited by the Court in the course of its opinion in this case. In that case one of the questions before the Court was whether it is within the power of Congress to provide by statute the limits of the provability in bankruptcy of the claim of a landlord for rentals covering the unexpired portion of the term of a lease, terminated by the bankruptcy of the lessee. In sustaining the power of Congress this Court was careful to point out the distinction between a bankruptcy statute which limited the remedy of a claimant under a contract and a claim for a debt secured by a mortgage or other lien. At page 451 the Court said:

> "Does the Act offend the due process guaranty by destruction of rights conferred by the petitioners' contract? They affirm that it does, not merely by impairing those rights but by direct taking pro tanto of

all remedies for their enforcement and, to that extent, of the contract itself. Conceding they have no lien upon, or property right in, the debtor's assets, such as was the subject of decision in Louisville Joint Stock Land Bank v. Radford, supra, they maintain that the Fifth Amendment assures them some effective procedure for the enforcement of the obligation of their contract; that the debtor's assets are a trust fund for creditors which cannot be invaded for the benefit of stockholders. As pointed out in the case last cited there is, as respects the exertion of the bankruptcy power, a significant difference between a property interest and a contract, since the Constitution does not forbid impairment of the obligation of the latter."

The question may be asked, What are the vested rights of the judgment lien creditors of the insolvent Railway Company whose claims do not come within the provisions of the Act of August 11, 1939? As judgment lien creditors we think the answer given by this Court in the Louisville Bank case, supra, is equally applicable as the answer to the question here suggested.

Referring to the controlling purpose of the Frazier-Lemke Act, Mr. Justice Brandeis, speaking for the Court, said (295 U. S. 555, l. c. 594):

"Its avowed object is to take from the mortgagee rights in the specific property held as security; and to that end 'to scale down the indebtedness' to the present value of the property. As here applied it has taken from the Bank the following property rights recognized by the Law of Kentucky:

"1. The right to retain the lien until the indebtedness thereby secured is paid.

"2. The right to realize upon the security by a judicial public sale.

"3. The right to determine when such sale shall be held, subject only to the discretion of the court.

"4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

"5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

See, also, the answer made to this question by the Court of Appeals for the Sixth Circuit in Re Tennessee Publishing Co., 81 Fed. (2d) 463, at page 463, 299 U. S. 18.

(b) The record in the District Court will further show that the receivership estate is without funds to pay the claims against the Wabash Company falling within the provisions of the said Act of August 11, 1939, as an operating expense of that Company, and therefore the assumption must be that claims of that class must be taken care of through reorganization.

II.

Because the judgment of this Court, in directing that the judgment of the Court of Appeals for the Eighth Circuit be vacated and that the case be remanded to the District Court with directions to allow petitioner's claim in accordance with the provisions of the amendatory statute, cannot, in the very nature of the case, end this litigation, for it is inevitable that as soon as the mandate on the present judgment of this Court is filed in the District Court the question as to the obligation of these respondent receivers to pay interest upon petitioner's judgment will arise, just as that question has already arisen in connec-

tion with other claims of like character now pending in the District Court. According to the record in this case petitioner's judgment was obtained on February 13, 1931 (Rec. 35). The statutes of Missouri allow interest at the rate of six per cent (6%) per annum on judgments obtained in the courts of that state (Section 2841, R. S. Mo. 1929), and one of the further questions to be decided by the District Court will be (a) whether these respondents are further obligated to pay interest upon petitioner's judgment from the date of rendition thereof in the state court to date of payment, or (b) whether, since petitioner's judgment claim did not become one of preferential character, entitled to priority of payment, until the approval of the amendatory Act of Section 77 (n) of the Bankruptcy Act on August 11, 1939, is petitioner, in any event, entitled to be paid interest only from that date?

Any judgment of the District Court allowing interest on petitioner's judgment claim, and on other judgment claims of like character, will likewise operate to further reduce the amount and value of the assets of the estate of the insolvent Railway which otherwise would be distributable pro rata among all general judgment creditors; and, for the reasons hereinabove set forth, those other judgment creditors are clearly entitled to be heard upon all of these questions which so directly affect their vested property rights.

III.

Respondents further assert, on behalf of the other lien creditors to whom we have hereinbefore referred, that the application of the provision of the amendatory Act of August 11, 1939, retrospectively to equity receiverships of railroad corporations now pending in courts of the United States is violative of their rights under the Tenth Amendment to the Constitution.

Apparently the Court, by its judgment herein of January 29, 1940, has determined this question adversely to the claim asserted by said judgment creditors, and the point we now urge is that such determination was made by this Court without any opportunity of said judgment creditors being heard, and without consideration of their inability to be heard upon the record which was before the Court, with scope of the review limited, by express order of the Court, to the question of petitioner's right to intervene in order to assert priority. We, therefore, urge upon the Court that its opinion of January 29, 1940, be so modified as to leave open for later consideration, if and when presented upon a proper record, the question whether the application of the Act of August 11, 1939, to equity receiverships of railroad corporations **now** pending in the courts of the United States will be in violation of their vested property rights as judgment lien creditors of the insolvent Railway Company, although of a class falling without the provisions of said amendatory Act.

CONCLUSION.

Wherefore, for the several reasons hereinbefore mentioned, these respondents respectfully pray that the opinion and judgment of this Court in this cause, entered January 29, 1940, be so modified as to limit the direction to the District Court to the vacation of its judgment entered on August 31, 1938, denying petitioner's application for intervention and, in lieu thereof, to grant petitioner's application for leave to intervene in order to assert priority of his claim and for the payment thereof as an operating expense of the defendant Wabash Railway Company; or, in the alternative, that the Court grant a rehearing of this cause with the right of all parties hereto (including general creditors of Wabash Railway Company whose judg-

ment claims do not come within the provisions of said Act of August 11, 1939) to be heard, and with the further right of any party to this cause to file with the clerk of this court, as a part of the record in this cause, 40 printed copies, the original of which shall be duly certified by the clerk of the District Court, of such parts of the record of the Wabash receivership proceeding pending in said District Court under the title of Chase National Bank of the City of New York, Trustee, Complainant, v. Wabash Railway Company et al., Defendants, Consolidated Cause In Equity 12,099, as may be deemed material to the issues proposed to be urged upon this Court upon rehearing.

Respectfully submitted,

FRANK C. NICODEMUS, JR.,
HOMER HALL,
NAT S. BROWN,
Counsel for Respondents, Receivers of Wabash Railway Company.

The undersigned, one of the counsel for respondents, Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company, hereby certifies that the foregoing petition for modification of the judgment entered herein, or, as an alternative, for rehearing, is not interposed for delay, but is presented in good faith, and believed to be meritorious.

Homer Hall,
Of Counsel for said Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 230.—October Term, 1939.

Peter J. Carpenter, Petitioner,
vs.
Wabash Railway Company, Frank C. Nicodemus, Jr., Norman B. Pitcairn, Receivers, etc., et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 29, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In February, 1931, petitioner recovered a judgment in the state court of Missouri for $15,000 against the Wabash Railway Company for personal injuries sustained in the course of his employment by that Company. On appeal, the judgment reduced to $10,000 was affirmed.

In December, 1931, on a complaint in equity brought by a creditor of the Wabash Railway Company in the federal court in Missouri, setting forth its financial difficulties and that its undisputed liabilities exceeded the actual value of its assets, receivers were appointed. Suits brought by mortgage trustees were consolidated with the first suit. A special master was appointed to take proof of claims and it appears that in January, 1936, the master allowed petitioner's claim as an unsecured claim without lien or priority.

In January, 1938, petitioner asked leave to file a petition seeking termination of the receivership on various grounds not important here. Among other things, petitioner then alleged that the master's ruling was erroneous and that the claim was entitled to priority. In denying that petition, the District Court considered this contention and held that the "status and classification of petioner's claim as an unsecured claim which is not entitled to any lien or priority of payment over any other unsecured claim" had been "correctly and finally determined in this cause" and that petitioner was "estopped from asserting a claim for preference and priority of payment". The Circuit Court of Appeals affirmed the decree of the District Court and in doing so passed upon that

question. The court said that no statute of Missouri and no decisions of its courts had been shown which provided or held that claims for personal injuries by employees were entitled to priority as operating expenses. Considering the contention of petitioner that the Wabash Railway Company was an Indiana corporation operating in that State and in Ohio and that the laws of those States accorded priority to his claim, the court thought that, even if so, "that situation can have no effect upon the operation and effect of this Missouri judgment". The court also observed that while by subsection (n) of Section 77 of the Bankruptcy Act claims for personal injuries to employees of a railroad corporation are entitled to priority, that provision applied expressly to proceedings in bankruptcy and the present case at this stage is an equity receivership. And, apart from that, the court considered petitioner foreclosed from asserting such rights in this suit, approving the ruling of the District Court in that respect. 103 F. (2d) 996.

Petition for certiorari was filed on July 26, 1939. Subsequently, by Act of Congress approved August 11, 1939, subsection (n) of Section 77 of the Bankruptcy Act was amended so as to apply to equity receiverships and thus to read as follows:

"In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad".

Petitioner then presented a supplemental brief in support of his application for certiorari, directing our attention to this statute, and in view of the importance of the question raised by the amendment, we granted certiorari, limited to the question of the right of the petitioner to intervene in order to assert priority. October 9, 1939.

For the present purpose, we may assume, without deciding, that the determination of the court below was correct upon the record before it and in the light of the law as it then stood. But it is our duty to consider the amended statute and to decide the question in

harmony with its provisions, if found to be applicable. The controlling rule was thus stated by Chief Justice Marshall in *United States* v. *Schooner Peggy*, 1 Cranch, 103, 110:

"It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside".

See, also, *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120; *Crozier* v. *Krupp*, 224 U. S. 290, 302; *Gulf, Colorado & Santa Fe Rwy. Co.* v. *Dennis*, 224 U. S. 503, 506; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21.

We are of the opinion that the amended statute is applicable to this proceeding. The statute applies to "equity receiverships of railroad corporations now . . . pending in any court of the United States". This is such a case. The statute applies to "claims for personal injuries to employees of a railroad corporation". This is such a claim. The statute says that a claim of that sort "shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad". This is a direct requirement governing the action of the court in this cause.

We have no doubt that Congress has constitutional power to impose this requirement. We have held that earnings, while a railroad is in possession of the court and operated by its receivers, "are not necessarily and exclusively the property of the mortgagees" but are subject to the payment of claims which have superior equities as these may be found to exist. *Fosdick* v. *Schall*, 99 U. S. 235; *Hale* v. *Frost*, 99 U. S. 389, 392. Claims having such equities may be accorded priority in payment although they arose prior to the receivership. *Miltenberger* v. *Logansport Railway Co.*, 106 U. S. 286; *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust Co.* v. *Illinois Midland Rwy. Co.*, 117 U. S. 434. It is manfiest that the reasonable classification of claims as entitled to priority because of superior equities may be the subject of determination by Congress in providing for the distribution of assets in bankruptcy proceed-

ings. See *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 451, 452. In this view, the provision of subsection (n) of Section 77 of the Bankruptcy Act, as it stood prior to the amendment of August 11, 1939, was sustained by the Circuit Court of Appeals of the Seventh Circuit in *Wise* v. *Chicago, R. I. & P. Rwy. Co.* (90 F. (2d) 312) with respect to certain unsecured surety bonds, and by the Circuit Court of Appeals of the Eighth Circuit with respect to claims for injuries to railroad employees. *Central Hanover Bank & Trust Co.* v. *Williams*, 95 F. (2d) 210; *Thompson* v. *Siratt*, 95 F. (2d) 214.

We see no ground for a different conclusion with respect to the power of Congress to enact the amendment in relation to the distribution of assets in the case of an equity receivership. And the fact that the provision as to the latter is included in a section of the bankruptcy statute does not derogate from its controlling authority as an expression of the will of Congress. The Circuit Court of Appeals of the Eighth Circuit has recently held this provision as to equity receiverships to be applicable and valid in relation to claims for personal injuries sustained by employees of this railroad corporation. *American Surety Co.* v. *Wabash Railway Co.*, 107 F. (2d) 685. We think the conclusion is sound.

It is urged in opposition to petitioner's contention that unless and until the District Court upon proper application has passed upon the question as to extending the time for filing petitioner's claim under the amended statute, the question of its priority is not properly before this Court; that petitioner has not asked the District Court to pass upon that question in the light of the amended statute. But when the Act of August 11, 1939, was passed, the case was before this Court upon petition for certiorari, which has been granted, and in order properly to dispose of the case we are bound, as already stated, to consider and apply the amended statute. Then, the argument is pressed that, at least, we should remand the case to the District Court in order that it may determine whether the claim for preference and payment under the amendment should be entertained. It is said that such applications may be considered in the light of existing circumstances, or of the stage which the proceedings have reached, as, for example, in relation to steps which may have been taken in carrying out plans for reorganization.

We find no provision in the statute for the exercise of such a discretion by the District Court where the proceedings to which the statute refers are pending and the claims are within the statute.

There is no suggestion that the present proceeding had been terminated prior to the enactment of the amendment or that it is not now pending. The statute is explicit and mandatory and the District Court has no discretion to act contrary to its terms. The statute says that the described claims "shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad". Petitioner's claim is within the class described and should be preferred and paid accordingly.

The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court with directions to allow petitioner's claim in accordance with the statutory provision.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.